MOTION FILED

MAR 17 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW JERSEY

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE JURISDICTIONAL STATEMENT FILED BY THE APPELLANT CITY OF PHILADELPHIA, et al.,

and,

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

WILLIAM C. BRASHARES,
PAUL M. LAURENZA,

Cladouhos & Brashares
1750 New York Ave., N.W.
Washington, D.C. 20006
(202) 833-1101
Attorneys for Amicus Curiae.

Washington, D.C. • THIEL PRESS • (202) 638-4821

Page

TABLE OF CONTENTS

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE JURISDICTIONAL STATEMENT FILED BY THE APPELLANT CITY OF PHILADELPHIA, et al. ..... *(i)*

CERTIFICATE OF SERVICE ..... *(vi)*

BRIEF AMICUS CURIAE

QUESTIONS PRESENTED 1

INTEREST OF AMICUS CURIAE 2

ARGUMENT

A. Solid and Liquid Waste and the Services Related to Disposal of Such Wastes Substantially Involve Interstate Commerce 2

B. P.L. 1973, c. 363, Poses a Classic Discrimination Against Interstate Commerce 3

CONCLUSION 6

CERTIFICATE OF SERVICE 8

TABLE OF CITATIONS

CASES:

Alexandria Scrap Corporation v. Hughes, 391 F. Supp. 46 (D. Md. 1975) 3

Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935) 6

Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 489 (1888) 2

Ex parte Lyons, 27 Cal. App. 2d 182, 80 P.2d 745 (D. Ct. of Apps., Cal. 1938) 5

Guy v. Baltimore, 100 U.S. 434, 443 (1879) 4

Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960) 4

Cases, continued: Page

Lutz v. Armour, 395 Pa. 576, 151 A.2d 108 (1959) 5

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 4

Railroad Co. v. Husen, 95 U.S. 465, 473 (1877). 4

Robbins v. Taxing District of Shelby County, 120 U.S. 489 (1887) 4

United States v. Pennsylvania Refuse Removal Ass'n., 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3rd Cir. 1966), *cert. den.*, 384 U.S. 961 (1966) 3

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 4

STATUTES:

Federal:

42 U.S.C. §3251 . . . . . (iv)

42 U.S.C. §3251(b)(1) 3

42 U.S.C. §3254 3

State:

P.L. 1973, c. 363. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE OF THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE JURISDICTIONAL STATEMENT FILED BY THE APPELLANT CITY OF PHILADELPHIA, et al.

Pursuant to Rule 42 of the Rules of the United States Supreme Court, the National Solid Wastes Management Association respectfully moves this Honorable Court for leave to file a brief in the captioned case

as amicus curiae in support of the Jurisdictional Statement filed by the City of Philadelphia et al., appellants herein, and to continue to participate as amicus curiae in this appeal should the Court assert jurisdiction. The brief which movant seeks leave to file is annexed to this motion.

Movant has received the written consent of counsel for the appellants herein to file a brief in this case as amicus curiae. Movant has requested the consent of appellees, State of New Jersey, Department of Environmental Protection et al. and was advised that appellees were not disposed to grant such consent at the present time and preferred to consider the participation of movant and any other potential amici at such later time as this Court might note probable jurisdiction of the subject cause. Due to the importance of the issues raised in this case to the business of movant's membership, movant has sought leave to file a brief at this time to support the assertion by this Court of jurisdiction.

The National Solid Wastes Management Association is a trade association based in Washington, D.C. which represents all major segments of private industry engaged in the solid waste field. This membership comprises over 2,000 contractor members, companies which are directly engaged in the collection, processing, transportation and disposal of residential and commercial waste material. Such members range from large, New York Stock Exchange–listed firms having operations throughout the United States to small family-operated one- or two-truck operators engaged in limited local markets. Aggregately, private industry engaged in solid waste collection and disposal is responsible for approximately half of the residential solid waste and

over 90 percent of the commercial and industrial liquid and solid waste collected and disposed of in the United States. *The Private Sector in Solid Waste Management, A Profile of Its Resources and Contribution to Collection and Disposal*, U.S. Environmental Protection Agency, SW-51d.1 (1973), p. 1.9. The Association's membership also includes owners and operators of landfill disposal facilities, manufacturers of virtually all types of equipment involved in the solid waste field and companies engaged in recovery of materials and energy from the solid waste stream. The Association is the recognized spokesman for the private solid waste industry before the federal government and state legislative and executive bodies and has participated extensively at all levels of government in the formulation of laws and policies dealing with improved environmental and economic standards for the collection, processing, disposal, and recovery of solid wastes.

The issues presented in the instant case have broad implication for the business of movant's membership and the quality and cost of the services they are able to provide to the public. Proper disposal of solid waste has become a serious and increasingly expensive undertaking, in some situations a crisis, throughout the country. In addition to the greater awareness of the potential hazards to public health and safety posed by irresponsible methods of disposal, more stringent air emmission standards have caused a closing down of incinerators throughout the country, thus causing even greater reliance upon land disposal. Increased attention to water pollution at federal and state levels has drawn attention to the effects of land disposal on underground water, a concern that has been intensified by the diversion of increasing volumes of liquid waste to land

disposal facilities where dumping into streams and rivers had been permissible.

In facing these environmental needs, states have pursued a broad range of solutions. Major focus has been given to long-term regional planning for waste disposal and land use. In many areas massive resource recovery programs have been initiated. These have been the directions urged and to some extent financed by the federal government through the Solid Waste Act of 1965, 42 U.S.C. §3251 et seq., and the Resource Recovery Act of 1970, 42 U.S.C. §3254 et seq., legislation premised upon the concept of cooperation among state and local governments to deal with a widespread problem that knows no state or local boundaries.

In a few instances, however, in desperation at the quantity of waste material to be absorbed and the difficulty in obtaining suitable land disposal sites due to increased public resistance and local zoning restrictions, resort has been made to laws or ordinances, such as that of the State of New Jersey in the instant case, to prohibit importation of waste material across state or other jurisdictional lines. Such action imposes immediate and direct restraints upon, and threatens economic injury to, private firms operating or using land disposal sites. It is a form of action that cannot be isolated. Jurisdictions deprived of access to traditional disposal sites beyond their boundaries will respond with similar barriers. Ten states have already instituted such import restrictions in one form or another,[1] and it is movant's understanding that many other states and local jurisdictions are considering similar measures but are

[1] Jurisdictional Statement, Appendix AA.

withholding action pending the outcome of this case. If the New Jersey Supreme Court's decision is allowed to stand, movant believes that non-importation legislation will proliferate, and that this regressive approach, rather than the positive regional approach sanctioned by Congress and now pursued by many states, will substantially dictate the future direction of solid waste management policies throughout the United States. The New Jersey statute presents a major impediment to sound forward-looking regional policies. This impediment will be eliminated by a decision of this Court that such a provision is in conflict with the commerce clause of the United States Constitution.

Wherefore, it is respectfully prayed that this motion for leave to file the annexed brief amicus curiae and to participate further as amicus curiae in this appeal be granted.

Respectfully submitted,

WILLIAM C. BRASHARES,
PAUL M. LAURENZA,
Cladouhos & Brashares
Attorneys for Amicus Curiae,
National Solid Waste
Management Association.

CERTIFICATE OF SERVICE

We hereby certify that on this day of March, 1976, three copies of this Motion for Permission to File Brief as Amicus Curiae of the National Solid Wastes Management Association in Support of the Jurisdictional Statement Filed by the Appellant City of Philadelphia, et al. were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By _____
William C. Brashares

By _____
Paul M. Laurenza

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

QUESTIONS PRESENTED

The statement of questions presented set forth in the Jurisdictional Statement of Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

The nature and interest of this amicus curiae is set forth in the Motion for Permission to File Brief As Amicus Curiae of the National Solid Wastes Management Association in Support of the Jurisdictional Statement Filed by the Appellant City of Philadelphia, et al., to which this brief is annexed and is incorporated herein by reference.

ARGUMENT

A. Solid and Liquid Waste and the Services Related to Disposal of Such Wastes Substantially Involve Interstate Commerce.

This case involves interstate movement of a substantial mass of material which has value and purpose in the reclamation of land and the recovery of secondary materials and is the subject of constant interstate business activity by thousands of businesses across the country under increasingly rigid legal standards to ensure protection of public health and the environment. This is not a matter of threatened importation of articles of trade which "spread disease, pestilence and death," *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 489 (1888), and which this Court has found a state to be entitled to regulate without conflict with the commerce clause of the Constitution, Art. 1, Sec. 8, cl. 3. This Court has never held that the movement of ordinary waste material was outside the flow of commerce, and in lower federal court cases considering the relation of waste material to commerce

the substantial involvement in commerce of waste transportation and disposal services has been readily acknowledged. See *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3rd Cir. 1966), *cert. den.*, 384 U.S. 961 (1966); *Alexandria Scrap Corporation v. Hughes*, 391 F. Supp. 46 (D. Md. 1975).

The issue of waste material as a legitimate and important subject of interstate commerce can no longer seriously be argued. Congress has clearly recognized the interstate nature of solid waste problems and, as with air and water pollution programs, has demonstrated concern for coordinated solid waste planning that ignores jurisdictional boundaries. 42 U.S.C. §3251(b)(1); 42 U.S.C. §3254. Nor is waste material itself any longer considered a worthless discarded item. Its disposal as part of land reclamation, its increasing value for recovery of secondary materials or conversion to various forms of energy and its vastly increased regulation under federal and state environmental standards have established beyond question its substantial importance in the flow of interstate commerce. To argue otherwise would be to ignore not only the nature and potential value of the material but the realities of a major nationwide business intimately engaged in the daily flow of commerce.

B. P.L. 1973, c. 363, Poses A Classic Discrimination Against Interstate Commerce.

The New Jersey legislation in issue, P.L. 1973, c. 363, poses a classic and blatant discrimination against interstate commerce in violation of the commerce clause of the United States Constitution. This is not, we respectfully submit, a matter of balancing the exercise of legitimate state police power against any indirect

burden upon interstate commerce. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960). Rather, it is clearly and unambiguously a case of a state law regulating the disposition of material within the state solely and exclusively on the basis of its origin in another state. *Railroad Co. v. Husen*, 95 U.S. 465, 473 (1877).

The dilemma claimed by the state of New Jersey to be the basis for its non-importation legislation, and the fact that waste material by its nature may pose dangers to public health, cannot obscure the constitutional impasse the state has reached. New Jersey is asserting in the clearest and simplest terms that it has a limited resource, i.e., its land available for waste disposal, and that this resource cannot serve the citizens of New Jersey for the duration desired if it is also made available to citizens of other states. This is precisely the situation this Court has faced in earlier cases where states atempted to confine limited local resources to their own citizenry and where this Court has found a wholly impermissible discrimination against interstate commerce. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

A state cannot protect its local industry by prohibiting importation of identical competitive goods, *Guy v. Baltimore*, 100 U.S. 434, 443 (1879), or discouraging such competition through discriminatory taxes or other actions, *Robbins v. Taxing District of Shelby County*, 120 U.S. 489 (1887). Certainly a state could not limit access to its highways or public accommodations to its own citizenry on the ground that such facilities would be overburdened or rendered inadequate for its own citizens by permitting the access of citizens of other states. These are all, as is the

restriction presented in the instant case, a substitution of the state's own geographic and parochial interests for the constitutional mandate that commerce must flow freely across state lines. This presents no issue of balancing, because a statute that on its face clearly discriminates in the treatment of goods or material originating in the state as opposed to out of state is in hopeless conflict with the commerce clause, notwithstanding any police power justification claimed on the grounds of public health and safety.

While we are aware of no previous cases involving importation of solid waste which consider the federal constitutional issues presented here, the reasonableness of distinction between local and non-local waste material has been at issue in at least two state court decisions. In *Ex parte Lyons*, 27 Cal. App.2d 182, 80 P.2d 745 (D. Ct. of Apps., Cal. 1938), a criminal ordinance banning transportation of waste into Orange County, California was struck down under the state constitution as unjustly discriminatory where identical locally generated waste could be used for the same purpose, feeding hogs, as was the imported waste. In *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959), the Pennsylvania Supreme Court held a township ordinance prohibiting importation of waste invalid under the state constitution as arbitrary and discriminatory, finding that:

> [I]n effect the ordinance . . . declares that garbage from without, regardless of quantity, is harmful and deleterious, but that local garbage, regardless of amount, conforms more to the community's health and general welfare standards. The distinction sought to be made is both artificial and devoid of merit. 151 A.2d at 110.

New Jersey has based its complete obstruction to the interstate flow of solid waste on the same distinction as was found wanting in the California and Pennsylvania cases just cited, and in doing so has confronted the far more emphatic proscription of the U.S. Constitution on such discrimination. A state faced with depletion of a natural resource that it seeks to extend for the benefit of its own citizens must look to solutions other than blocking the flow of commerce. Increased disposal charges for all parties using New Jersey disposal sites, regardless of the origin of material, might well provide incentive for neighboring states to develop alternative sites. New Jersey itself might look to other potentially available land within its own borders or to development of resource or energy recovery programs that would help prolong the life of existing land disposal sites. These are all possibilities being explored in many states, and while they may represent planning and fiscal burdens, such burdens have never been found by this Court to permit a state to build walls at its borders in defiance of the United States Constitution.

CONCLUSION

The dilemma of New Jersey is not unique. It is part and parcel of an intense new national concern for the environment and the use and preservation of land. These are concerns that depend heavily for their resolution upon the constitutional philosophy that "the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). The Congress has given considerable encouragement for the states to swim together, and the Constitution, we submit, does not permit a state to opt

out of the collective endeavor by the creation of such barriers to commerce as New Jersey has chosen here as its own remedy. The National Solid Wastes Management Association as amicus curiae urges this honorable Court to recognize the substantial constitutional questions presented herein and the critical impact of this precedent of the New Jersey Supreme Court on the national effort to deal with this major area of environmental improvement, to assert jurisdiction in this appeal and to consider on the merits the implications of the subject law under the United States Constitution.

Respectfully submitted,

WILLIAM C. BRASHARES
PAUL M. LAURENZA
Cladouhos & Brashares
Attorneys for Amicus Curiae.

CERTIFICATE OF SERVICE

We hereby certify that on this day of March, 1976, three copies of this Motion for Permission to File Brief For National Solid Wastes Management Association as Amicus Curiae were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By _____
William C. Brashares

By _____
Paul M. Laurenza